the State of California, Second Appellate District, denied without opinion a petition for a writ of prohibition/mandate on October 29, 1971. On November 24, 1971, the California Supreme Court denied without opinion a petition for hearing. On January 20, 1972, a petition for a writ of certiorari was filed in this Court "to review the Judgment of the Court of Appeal of the State of California, Second Appellate District, entered in this case on October 29, 1971." (Petition, p. 1.) This Court has directed that a response be filed in this case on or before April 17, 1972.[2]

Petitioners erroneously state that "the decision below not to dismiss the indictment is based upon the principle that illegally seized evidence may be the basis of an indictment." (Petition, p. 17.) The most Petitioners can claim is that the Superior Court denied the motions under California Penal Code sections 995 and 1538.5 because it had erroneously determined that evidence which constituted the basis of the indictment had not been illegally seized. This is, of course, an entirely different matter.

This Court Lacks Jurisdiction to Hear This Matter.

Both California Penal Code sections 995 and 1538.5 pertain to pretrial proceedings in a criminal case. Neither the denial without opinion of a petition for a writ of prohibition/mandate by the Court of Appeal of the State of California, Second Appellate District, nor the denial without opinion of a hearing by the California Supreme Court constituted a conclusive decision on the merits.

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[2]Although the Clerk of this Court requested the Attorney General of the State of California to file a response, it is the District Attorney of the County of Los Angeles who is the attorney of record for the real party in interest. For that reason, the latter will file this response.

Indeed, "It is settled law that an appellate court's action denying without opinion a petition for a writ of mandate or prohibition is not the determination of a 'cause' requiring oral argument and a written opinion." (*People v. Medina*, 6 Cal.3d 484, 490, 492 P.2d 686, 689.) Furthermore, "The denial without opinion of a petition for a writ of mandate or prohibition is not res judicata except when the sole possible ground of denial was on the merits or it affirmatively appears that the denial was intended to be on the merits." (*Id.*, 6 Cal.3d at 491 (footnote 6); 492 P.2d at 690.)

Manifestly, Petitioners have erroneously invoked the jurisdiction of this Court under 28 U.S.C. Section 1257(3) because there has been no "[f]inal judgment or decree rendered by the highest court of a State in which a decision could be had, . . ." (See *Whitus v. Georgia*, 385 U.S. 545, 546-547, 17 L.Ed.2d 599, 602, 87 S.Ct. 643; *Chapman v. California*, October Term, 1971, No. 71-615, 40 L.W. 3467.)[3]

Finally, even if it should be deemed that the denial of the petition for writ of prohibition/mandate by the Court of Appeal of the State of California, Second Appellate District, constituted a final judgment or decree within the meaning of 28 U.S.C. Section 1257(3), we respectfully urge that the instant case, which involves

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[3]Because this Court in *Chapman* denied the petition for a writ of certiorari, "[i]t appearing that the state court decision is not final," although a writen opinion was rendered by a California appellate court respecting pretrial litigation of search and seizure issues in an obscenity case, there is all the more reason to conclude that the petition for a writ of certiorari should be denied in the instant case where the appellate courts did not render written opinions. It should be noted that *Chapman*, as does the instant case, does not involve a situation where denial of review would effectively foreclose this Court's later consideration of a federal claim. (Compare, *California v. Stewart*, 383 U.S. 436, 498 (footnote 71), 16 L.Ed.2d 694, 86 S.Ct. 1602.)

a pending criminal prosecution set for trial, is not appropriate for a present review on writ of certiorari. Rule 19, Rules of the Supreme Court of the United States. See *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 699, 91 S.Ct. 746; *Samuels v. Mackell*, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764; *Boyle v. Landry*, 401 U.S. 77, 27 L.Ed.2d 696, 91 S.Ct. 758; *Perez v. Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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